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No. 86-417 (2)

In The
Supreme Court of the United States
October Term, 1986

Norman Gardner, Ramona Walhof, John Cheadle,
Petitioners,

vs.

John V. Evans, Marty Peterson, Lawrence W. Barnes, Jack Ugaki, Howard Barton,
Respondents.

BRIEF IN OPPOSITION TO CERTIORARI TO THE SUPREME COURT FOR THE STATE OF IDAHO

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November 12, 1986

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12pp

QUESTIONS PRESENTED

Petitioners' Statement of Questions Presented does not accurately relate to the issues presented to, and resolved by, the Idaho Supreme Court, and does not reflect the arguments presented as reasons for granting the writ.

All of the issues decided by the State Supreme Court flow from the termination by the Idaho Commission for the Blind (hereinafter I.C.B.), of its executive director and her assistant. The issues resolved by the state court were as follows:

1. Did the actions violate the Idaho Open Meetings Law, Idaho Code § 67-2340, *et seq.*?

2. Whether the actions violated Petitioners' freedom of association.

3. Whether the actions violated Petitioners' freedom of speech.

4. Whether Petitioners were denied procedural due process.

5. Whether the actions constituted a violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1984).

6. The claim for defamation raised for the first time on appeal was dismissed, and Petitioners have not included this issue in the Petition.

LIST OF PARTIES

Petitioners have accurately listed the parties with the exception of the assertion that Petitioner Norman Gardner acted representing the Idaho Commission for the Blind. Counsel for Respondents was appointed by the Attorney General of the State of Idaho as Special Deputy Attorney General for the Idaho Commission for the Blind and has officially represented that entity throughout the course of this litigation.

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—o—

OPINIONS BELOW

The Opinion of the Idaho Supreme Court may be found in Petitioners' Appendix commencing at A-6.

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STATUTES INVOLVED

The statutes involved in this case include those identified by Petitioners, and the Idaho Open Meetings Law, Idaho Code § 67-2340, *et seq.*

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STATEMENT OF THE CASE

Petitioners' Statement of the Case indicates in footnote No. 1 that a copy of all portions of the record relied on in the Petition have been lodged with the Clerk of the Supreme Court of the United States. Petitioners make substantial factual assertions by reference to various depositions taken in the state court proceeding; however, counsel for Respondents has been informed on two occasions by the Clerk's office that these transcripts have not been filed with the Clerk of the United States Supreme Court. A substantially more accurate summary of the facts may be found in the Opinion of the Supreme Court of Idaho, found in Petitioners' Index, pp. A-6.1 —6.8.

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SUMMARY OF ARGUMENT

1. This Petition for Writ of Certiorari has not been timely filed.

2. Petitioners, in essence, are asking the United States Supreme Court to act as a finder of fact. They do not substantively challenge the Idaho Supreme Court's

application of either Idaho law, federal law, or the Federal Constitution. They have not identified to the Court the types of reasons for granting a petition for writ of certiorari contemplated by Rule 17, Rules of the Supreme Court of the United States.

ARGUMENT

I. THIS PETITION HAS NOT BEEN TIMELY FILED IN ACCORDANCE WITH RULE 20, RULES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioners have incorrectly characterized the Opinion of the Idaho Supreme Court as a memorandum opinion. The Opinion, which is the judgment of the state supreme court, was issued on May 22, 1986. Petitioners' Appendix, p. A-6. Rule 24.4, Rules of the Supreme Court of the United States, provides that the 90-day limit for filing of a petition for certiorari commences from the date the judgment or decree sought to be reviewed is rendered, "and not from the date of the issuance of the mandate (or its equivalent under local practice)." Rule 38, Idaho Appellate Rules, provides that a remittitur, "shall advise the district court or administrative agency that the opinion has become final and that the district court or administrative agency shall forthwith comply with the directive of the opinion." Petitioners' Appendix, p. A-55. The Idaho remittitur is clearly the date of issuance of the mandate contemplated by Rule 20.4. Rules of the Supreme Court of the United States. The Petition was filed on September 11, 1986, more than 90 days after entry of the Judgment on May 22, 1986. *See* Petitioners' Appendix, p. A-6.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO GRANT CERTIORARI.

The character of reasons which govern review on certiorari are described in Rule 17, Rules of the Supreme Court of the United States. Under a broad reading of this rule, Petitioners should have identified a conflict between the decision of the Idaho Supreme Court and a prior decision of this Court, another state court, or a federal court of appeals. They have not. Nor have Petitioners identified an important question of federal law resolved by the Idaho Supreme Court, which had not yet been decided by the United States Supreme Court.

While the decision to grant certiorari is wholly discretionary with the U.S. Supreme Court, it should not be granted except in cases where the principles involved are of the parties involved. *Rice v. Sioux City Memorial Parks Cemetery*, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed.2d 897 (1955). The questions addressed by Petitioners do not relate to blind people as a general class, but rather to the specific employment interests of the two individuals.

The Petition essentially asks the United States Supreme Court to assume the role of fact-finder, and fails to recognize the facts as reflected by the record and recited by the Idaho Supreme Court in its decision. This is a procedural necessity as the case was resolved by the trial court on a motion for summary judgment. The issues presented by Petitioners rest largely on a determination of Idaho state law and affect only the employment interest of two individuals. The significance of these distinctions may be seen in the brief examination of Petitioners' specific argument which follows.

A. The Idaho Supreme Court Did Not Refuse to Extend 42 U.S.C. Section 1985(3) to Members of a Constitutionally Protected Association or to Members of a Congressionally Protected Class of Blind Persons, and Did Not Refuse to Grant Judicial Protection to the Claims for Freedoms of Speech and Association.

The initial case before the District Court of the Fourth Judicial District of the State of Idaho, was resolved on summary judgment only after Petitioners were offered extensive opportunities for discovery. Petitioners' Appendix, p. A-12. The trial court, and the Idaho Supreme Court, carefully reviewed Petitioners' assertion that the actions of Respondents had violated their freedoms of association and speech. The Idaho State Supreme Court specifically analyzed these assertions based upon the complete factual record, and the applicable case law of the United States Supreme Court. See Petitioners' Appendix, pp. A-6.8—6.17. In response to these arguments, the Idaho court analyzed the facts in terms of *Mt. Healthy City School Dist. Bd. of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Accordingly, Petitioners had to show that the speech and association rights were a substantial factor in their discharge, and also that the protected speech affected matters of public concern. Petitioners' unsupported reconstruction of the facts cannot alter the record before the state court, and does not alter the fact that the state supreme court applied the current case law of the United States Supreme Court to the facts of the case.

B. Section 504 of the Rehabilitation Act of 1963 Was Properly Applied by the State Supreme Court.

The Idaho Supreme Court's analysis of this issue is found in Petitioners' Appendix, pp. A-6.21—6.23. Again,

the Idaho Supreme Court specifically applied current federal law to the facts of the case. The court found that a plaintiff must establish the following four elements to succeed on a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. 1984): (1) that he or she is handicapped; (2) that he or she is otherwise qualified for the position sought; (3) that he or she has been discriminated against solely by reason of the handicap; and (4) that the position exists as part of a program or activity receiving federal financial assistance.

The Idaho Supreme Court found that neither petitioner had created even a factual question with respect to the third requirement—that Walhof and Cheadle had been dismissed solely because of their handicap. Petitioners' own allegations make this conclusion inescapable. The Rehabilitation Act claim had been added to the pleadings as an afterthought, and the claim was inconsistent with the primary assertion that they had been dismissed either because of speeches made, or because of their membership in the National Federation of the Blind.

III. PETITIONERS DO NOT RAISE A SPECIAL OR IMPORTANT DUE PROCESS CLAIM.

Petitioners again allege nothing more than simple disagreement with the facts reflected by the record and the decision of the Idaho Supreme Court. The state supreme court addressed the due process question at Petitioners' Appendix, pp. A-6.17—6.21. Walhof and Cheadle were "at will" employees under Idaho state law. The state court properly applied *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and determined that there was no property interest in continued employ-

ment to which Walhof and Cheadle could claim entitlement. This is a matter of state law that is not in conflict with any federal decision or law and does not create a special or important reason for granting certiorari.

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CONCLUSION

The Court should refuse to grant Petitioners' Petition for Certiorari because: (1) it was not timely filed, and (2) no special or important questions of federal law are raised by the Idaho Supreme Court Decision.

Respectfully submitted,

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